**IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL**

Court's order whether the case is or not approved for reporting

Chapter VIII, Rule 32(2) (b)
Description of case

**Criminal Appeal No.25 of 2003**
**With**
**Criminal Appeal No.26 of 2003**

Date of decision: 24.12.2004

For the approval of:

Hon'ble Mr. Justice J.C.S. Rawat.

- Whether the order/judgment should be sent to the reporters for reporting ?

  Yes.

- Whether the reporters be allowed to see the judgment?

  Yes.

Dated 24.12.2004

IN THE HIGH COURT OF UTTARANCHAL

AT NAINITAL

CRIMINAL APPEAL NO. 25 OF 2003

Mahendra Singh Son of Late Madan Singh,
R/o Village Naugaon Patwari Circle-Kandai
Patti-Bachchansuon Tehsil and District-Rudraprayag.
------- Appellant.

**Versus**

State -------Respondent.

With

**Criminal Appeal No. 26 of 2003**

Smt. Sub Dei Devi alias Subudhi Devi
Wife of Late Madan Singh
R/o village-Naugaon Patwari Circle-Kandai
Patti-Bachchansuon Tehsil and District-Rudraprayag.
------- Appellant.

**Versus**

State ---------Respondent.

**Mr. Pankaj Purohit learned counsel for the appellants.**
**Mr. J.P.N.Singh and Mr. P.S.Saun learned A.G.A. for the State.**

**HON'BLE J.C.S. RAWAT, J.**

**1**- These are two criminal Appeals preferred by the appellants Mahendra Singh and Smt. Sub Dei Devi alias Subudhi Devi against the judgment and order dated 04.01.2003 passed by Shri Rama Kant Sharma, the then Sessions Judge, Rudraprayag in S.T. No. 27/2002 by which he convicted and sentenced the appellants under section 304 B IPC to undergo R.I. for seven years and under section 120 B IPC to undergo R.I. for one year, u/s 498 A IPC to undergo R.I. for six months and u/s 201 IPC to undergo R.I. for one year. All the sentences were ordered to run concurrently.

**2**- The facts, in brief, are that the appellant Mahendra Singh and Smt. Bhaga Devi (deceased were married on 03-03-2002 according to Hindu rituals. The appellants maltreated the deceased Smt. Bhaga Devi for dowry after the marriage and said that her father had given nothing in dowry. The appellant Mahendra Singh is the drive and he has tortured the deceased several times. The appellant Mahendra Singh. demanded money for dowry for purchase of vehicle. When the deceased went to her parental house she brought the above facts to the notice of her parents and further informed them that her husband and mother-in-law tortured her for dowry. On 17-06-2002 when Gyan Singh (PW-1) went to the village of in-laws of his daughter (deceased), the deceased demanded tools for agriculture purpose, like Kudal and Sickle. On 26-06-2002 when the complainant Gyan Singh (PW-1) went along with the aforesaid tools at the house of his daughter then the deceased was not at the house. On inquiry the appellant Smt. Sub Dei Devi alias Subudhi Devi informed that the deceased had left somewhere. Gyan Singh (PW-1) believed that his daughter had been murdered.

**3**- Gyan Singh (PW-1) submitted application dated 27-06-2002 Ex.Ka-1 to the District Magistrate, Rudraprayag narrating the above facts. On the basis of written report Ex.Ka-1, FIR Ex.Ka-3) was prepared by Balbir Singh Negi Patwari (PW-5) and a case was registered against the appellants and other vide G.D. entry Ex.Ka-4) and also prepared site plan Ex.Ka-5 of the place of the occurrence. Balbir Singh Patwari (PW-5) arrested the appellant Mahendra Singh on 28-06-2002 and prepared memo of arrest Ex.Ka-6. He also

prepared memo Ex.Ka-2 in respect of recovery of Dhoti of the deceased on 06-07-2002. Thereafter the investigation was entrusted to R.P. Singh (PW-7) S.O. vide letter dated 09-07-2002 of S.P. Rudraprayag Ex.Ka-8. He prepared site plan Ex.Ka-9. After recording the statements of the witnesses the case was converted into sections 304 B/201 IPC vide G.D. entry Ex.Ka-11. Thereafter the investigation was transferred to Shir Thakur Singh Rawat (PW-8) S.P. Rudraprayag. After completing investigation charge-sheet Ex.Ka-24 was submitted against the appellants and others.

**4**- Charge was framed against the appellants under sections 304 B, 498 A, 120 B and 201 IPC. The appellants pleaded not guilty and claimed to be tried.

**5**- The prosecution in support of its case examined PW1 Gyan Singh, father of the deceased who proved written report (Ex.Ka-1), PW2 Smt. Rikholi Devi is the mother of the deceased, PW3 Kunwar Singh s/o Baisakh Singh, PW-4 Rai Singh, PW-6 Gopal Singh are the witnesses residing in the village of PW-1 Gyan Singh and have narrated the incident. PW-5 Balbir Singh Negi, PW-7 R.P. Singh S.O. and PW-8 Thakur Singh Rawat S.P. are not the witnesses of the fact and they investigated the case.

**6**- In the statement under section 313 Cr.PC. the appellants have admitted that Smt. Bhaga Devi (deceased) was married to Mahendra Singh appellant and denied other allegations of the prosecution. The appellant Mahendra Singh stated that he was not present at his house from 23-06-2002 to 26-06-2002.

**7**- On appreciation of the entire evidence on record the learned trial court found the appellants guilty under sections 304 B, 498 A, 120 B and 201 IPC and convicted and sentenced the appellants as above.

**8**- I have heard the learned counsel for the appellants and learned A.G.A. and perused the evidence.

**9**- It is not disputed that the appellant Mahendra Singh and the deceased Smt. Bhaga Devi were married on 03-03-2002. It is also not disputed that the deceased Smt. Bhaga Devi died unnatural death.

**10**- Now I have to determine as to who is responsible for causing the death of the deceased. It is a well-settled principle of law that in order to convict an accused for an offence U/s 304B IPC, the following essentials must be satisfied: -

(i) The death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances.
(ii) Such a death must have occurred with in seven years of her marriage.
(iii) Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband.
(iv) Such cruelty or harassment must be for, or, in connection with demand of dowry.
(v) Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

**11**- If the prosecution establishes the ingredients of section 304 B IPC as indicated above then a presumption of dowry death shall be drawn against the appellant u/s 113 B of the Indian Evidence Act. It is to be kept in mind that a presumption u/s 113 B is a presumption of law. Both the sections 304 B and 113 B were inserted by the Dowry Prohibition Amendment Act (No. 43 of 1986) with a view to combat the increasing menace of dowry deaths. Section 113 B reads as follows:-

> "113 B:- *Presumption as to dowry death*-When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person caused the dowry death.
>
> ***Explanation*** *:-* For the purposes of this section 'dowry death' shall have the same meaning as in Section 304 B of the IPC (45 of 1860)"

**12-** On proof of essentials mentions in section 304 B IPC it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:-

(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption

can be raised only if the accused is being tried for the offence u/s 304 B IPC).

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(2) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

A conjoint reading of Section 113 B of the Evidence Act and section 304 B IPC shows that there must me material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where section 113 B of the Evidence Act and section 304 B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and it would depend upon circumstances of each case and no strait- jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption u/s 113 B of the Evidence Act. The expression 'soon before her death' used in the substantive section 304 B IPC and section 113 B of the Evidence Act is

present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in section 114, Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods 'soon after the theft, is either the thief has received the goods knowing them to be stoled, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effect of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence.

**13**- The word 'cruelty' used u/s 304 B IPC is not defined under that section. Section 498 A IPC makes cruelty by husband to the wife as punishable offence. The word 'cruelty' has been defined in explanation appended to the said section. Section 498 A IPC with the explanation there under reads as follows:-

"498 A- Husband or relative of husband of a woman subjecting her to cruelty-Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

***Explanation*:**- For the purpose of the section 'cruelty' means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury to danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet nay unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand,"

**14-** Now in the light of the above proposition of law I have to analysis as to whether the prosecution was able to prove the charges levelled against the appellants or not.

**15-** The learned counsel for the appellant vehemently argued that there was absolutely no evidence on record to suggest that the appellant subjected the death of Smt. Bhaga Devi to cruelty or harassment soon before her death and that such cruelty or harassment was for, or in connection with the demand of dowry. Now I will focus my attention in particular to the last three ingredients as indicated above.

**16**- The prosecution has to establish that soon before her death the deceased must have been subjected to cruelty by her husband or by his relatives. The prosecution has adduced the evidence of PW1 Gyan Singh who stated in his evidence that the appellant Mahendra Singh used to demand money for the purchase of a vehicle and the said demand was not fulfilled. It was further stated by PW1 Gyan Singh that on 17.06.2002 he went to the matrimonial house of her daughter and he came back from there to his house in the same evening. At that time when he was coming to his house her daughter Smt. Bhaga Devi deceased asked him to bring one Kudal, knife and sickle for domestic use. Thereafter PW1 Gyan Singh went to her matrimonial house on 26.6.2002 alongwith said agriculture tools but he did not find her daughter in the matrimonial house. PW1 Gyan Singh had not stated in his evidence that immediately before her death the deceased was subjected to cruelty at the matrimonial house. The prosecution also produced PW2 Smt.Rikholi Devi, the mother of the deceased, who stated in her evidence during the trial that whenever the deceased used to come to her parental house she always informed her mother that the appellant and her mother-in-law tortured the deceased for the demand of dowry and further used to say that they demanded money for the purchase of vehicle. PW2 Smt. Rikholi Devi has also not indicated the last date when such demand was made to her and whether it was immediately before her death or not. She has further stated in her evidence that on 7.6.2002 when her husband PW1 Gyan Singh went to the matrimonial house of her daughter she demanded Kudal, knife and sickle. There is nothing in evidence with regard to

cruelty immediately before her death, which resulted the death of the deceased. The prosecution has also adduced the evidence of PW6 Gopal Singh on this point who stated in his evidence that he was sitting on the STD booth of Chandi Prasad on 5.6.2002 where he received a telephonic message from the appellant Mahendra Singh on which the he stated on telephone that if there was any person of village Phalasi and he had to send a message to PW1 Gyan Singh. PW6 Gopal Singh informed that he belongs to village Phalasi and the message may be given to him. Then the appellant asked PW6 Gopal Singh to inform Gyan Singh PW1 that the latter had not sent the money as demanded by the appellant Mahendra Singh. The appellant Mahendra Singh also stated on telephone to Gopal Singh PW6 that the deceased was his daughter and also asked to convey his message that the appellant Mahendra Singh was waiting for the money. PW6 Gopal Singh is a chance witness and he stated in his cross-examination that he was well known to Gyan Singh PW1 and he communicated this message to Gyan Singh PW1 and did not tell this fact to any other family member of Gyan Singh. Gopal Singh PW6 sometimes worked as a conductor and some times he worked as a driver and some times he worked as labourer. It is also revealed from his evidence that some time he remained in the village and some time he remained outside his village. PW1 Gyan Singh has categorically stated in his evidence that Gopal Singh PW6 did not reside in his village and no such person viz, Gopal Singh belongs to his village. Apart this, the evidence of PW1 Gyan Singh did not disclose this fact in his evidence at all. In case any such demand had been communicated by Gopal Singh PW6 to Gyan Singh PW1 it ought to have been

stated in his evidence during the trial. This fact clearly casts a shadow on the entire evidence of PW6 Gopal Singh. The perusal of the entire evidence reveals that the prosecution has totally failed to prove the fact that the deceased was subjected to cruelty immediately before her death. The sickle, knife and Kudal, which were asked by the deceased wife of the appellant Mahendra Singh to bring, do not come within the purview of dowry.

**18-** In view of the above discussion, I am of the opinion that the main ingredients of Section 304 B IPC are not established in this case.

**19-** The learned counsel for the appellants further contended that the prosecution has to further prove that the death of the deceased was an unnatural death. It was further submitted that the factum of death has not been established by cogent evidence. The learned A.G.A. refuted the contention. It is well settled principle of law that in a trial murder it is neither an absolute necessity nor an essential ingredient to establish *corpus delicti.* The fact of the death of the deceased must be established like in other fact of corpus *delicti* in some cases it be possibly not traced or recovered. There may be number of possibilities where a dead body could be disposed of without trace, therefore, the recovery of dead body is not mandatory to convict an accused in number of cases. So many times the accused used to manage that the dead body was destroyed, which could be done to the accused complete immunity from being guilt or from being punished. The only required under law to base conviction for an offence of murder is that there should be a reliable and plausible evidence that

the offence of murder was committed and it must be proved by direct or circumstantial evidence.

**20**- The prosecution has further adduced the evidence of PW3 Kunwar Singh who stated in his evidence that Gyan Singh PW1 informed in the village about the '*Gumshudi* of his daughter from her matrimonial house in the evening of 26.6.2002. He also informed that her in-laws had murdered her daughter. Thereupon on 26-06-2002 10- 11 persons alongwith PW-1 Gyan Singh and PW-3 Kunwar Singh went to the house of the appellants. 3-4 persons out of 11 went to meet the appellants at their residence. The appellant Mahendra Singh met there and they enquired about the whereabouts of the deceased. The appellant Mahendra Singh came out from his house and he took Kunwar Singh PW-3 alongwith Bishan Lal to the nearby road and he confessed his guilt. He stated that he committed a mistake. He enquired from Bhaga Devi (deceased) about the money, which the appellants demanded to bring from her parental house to purchase a vehicle and the deceased retaliated peacefully so he caught hold of her neck and due to mistake he committed her murder. He informed to her family members. The dead body of the deceased was thrown in Alaknanada River during the night when the whole village was asleep. Thereafter the appellant Mahendra Singh alongwith two other persons came to the house of the appellant Mahendra Singh and they took Gyan Singh PW-1 alongwith them and later on PW-3 Kunwar Singh informed this fact to Gyan Singh PW-1 on the road. The prosecution has adduced the evidence of extra judicial confession before Gopal Singh PW-6 and Bishan Singh. The prosecution has not

produced the evidence of Bishan Singh to prove the extra judicial confession for the reasons best known to the prosecution. It is well settled principle of law that an extra judicial confession can be relied upon by the court if it is true and it is voluntarily made by the accused. The evidentiary value of extra judicial confession depends upon the veracity of the witness to whom it has been made. The evidentiary value with regard to extra judicial confession depends upon the reliability of the witness who gives the evidence. It is not open to the court to raise a presumption that the extra judicial confession is a week type of evidence. The evidence of extra judicial confession depends upon the nature and circumstances of the case when the confession was made and the credibility of the witness who speaks to such confession. The extra judicial confession can be relied upon if it comes from the mouth of unbiased witness or who is not remotely related to the accused and in respect of whom nothing is brought out which may tent to indicate that he may have a motive of attracting an untruthful statement to the accused. The extra judicial confession must be unambiguous clear, unmistakenly conveys that the accused is the preparatory of the crime and nothing is omitted by the witness, which may militate against him. In the present case Kunwar Singh PW-3 to whom the appellant Mahendra Singh has given extra judicial confession is admittedly a relation of PW-1 Gyan Singh though PW-1 Gyan Singh and PW-3 Kunwar Singh have not admitted the relationship but Smt. Rikholi Devi PW-2 wife of PW-1 Gyan Singh has admitted that he is related to the complainant. Thus it is natural that a person who committed a crime may share his terrible secret with regard to the commission of the offence to

a man who is confidence of him. The appellant Mahendra Singh will expect from that fellow that he will help to save him from the clutches of the law. The appellant Mahendra Singh will never confess his guilt before a person who is related to the complainant and would in his turn communicate it to the complainant. Thus it is improbable that the appellant would repose confidence in Kunwar Singh PW-3 who is related to the deceased as well as the father of the deceased. Apart this, the main fact had not been stated by the appellant Mahendra Singh to PW-3 Kunwar Singh as to when he committed the murder of his wife and at what place the appellant Mahendra Singh had thrown the dead body of the deceased. These facts create a doubt on the testimony of the prosecution witness. Apart this, the complaint was given to the District Magistrate on 27-06-2002 by PW1 Gyan Singh. On the basis of the complaint FIR was lodged at the police station at 5:00 p.m. It is also in the evidence of PW-3 Kunwar Singh that the appellant Mahendra Singh confessed his guilt on 27-06-2002 in the morning at about 8:00 a.m. Admittedly, the report was lodged thereafter. The said extra judicial confession by the appellant was communicated immediately after to PW-1 Gyan Singh by PW-3 Kunwar Singh. When PW-1 Gyan Singh reported the matter to the police by way of an application to the District Magistrate. The FIR does not contain this fact of extra judicial confession in that report. If it was so it would have been written in the FIR. Gyan Singh PW-1 lodged the FIR but nothing about extra judicial confession was mentioned in it. There is no mention about this vital fact in there said report. In these circumstances non-mention of this vital fact may render the prosecution version doubtful.

It is also in the prosecution evidence that Kunwar Singh PW-3 was also accompanying Gyan Singh PW-1 at the time of submission of the report to the District Magistrate. The totality of the circumstances as indicated above cast doubt on the prosecution version.

**21-** In the present case I find that the investigation was so slips hod that it casts a doubt on the aspects of the prosecution. The perusal of the record reveals that at one hand the prosecution was of the view that the death of the deceased was caused by strangulation by the appellant Mahendra Singh and they are taking the help of extra judicial confession and other circumstances of the case. On the other hand the prosecution sent the information to other districts that the lady was missing from her matrimonial house. The said paper is on record. The investigating agency has not applied for the police remand of the appellant Mahendra Singh so that the other facts may be brought on record.

**22-**The prosecution has also placed reliance on the circumstances that a 'Dhoti' was recovered from Alaknanda River, which is said that it belonged to the deceased, and recovery memo was prepared. It is also in the evidence that on 06-07-2002 PW-1 Gyan Singh alongwith other persons found a 'Dhoti' on the bank of Alaknanda river and Patwari was informed who prepared the recovery memo. PW-1 Gyan Singh stated that

"धोती लड़की के गयाब होने के तीन चार दिन बाद नदी के किनारे मिली थी। हम 20–30 आदमी नदी के किनारे किनारे गये थे सरकारी आदमी काई नहीं था, जब धोती हमको मिली

तब हम काण्डई पटवारी के पास गये । हमने नौगाव वालों को नहीं बुलाया जितने लोग हम वहां पर थे सभी 18 19 लोगों ने दस्तखत किये थे, धोती पत्थरों से दबायी नहीं थी, पत्थरों पर लिपटी हुई थी, पत्थर काफी बड़ा था। बड़ा भाग धोती का पत्थर पर लिपटा था छोटा भाग पानी में था यह कहना गलत है कि धोती के छोटे–छोटे पत्थरों से दबाया गया हो।"

P.W.4 Rai Singh in his cross-examination with regard to this fact has stated that धोती सिर्फ एक पत्थर पर लिपटी थी। धोती गुलाबी रंग की फटी हुई थी। छोटे पत्थरों से धोती नहीं दबाई थी।

P.W.5 Balbir Singh has stated in his cross-examination that धोती का एक छोर छोटे छोटे पत्थरों से दबा है।

**23-** Apart from this contradictory version about the recovery of 'dhoti' there is no evidence on record that the deceased was wearing that 'dhoti' at the time of the death and there is no connecting evidence that nobody has at last seen wearing the same 'dhoti'. It is also in the evidence that there was a cremation nearby the place of recovery. The recovery of 'dhoti' may be there but does not connect with any evidence as indicated above.

**24.** On consideration of the totality of facts, circumstances, evidence and the material on record, I am of the considered opinion that the circumstances as relied upon by the prosecution have not been established and the appellants could not have been held guitly of committing the offence with which they had been charged. The learned trial court erred in holding that the prosecution had established the guilt

against the appellants beyond reasonable doubt. The appeals succeed and are liable to be allowed accordingly.

**25.** Both the appeals are allowed. The conviction and sentence awarded to the appellants per judgment and order dated 04-01-2003 passed by the Sessions Judge, Rudraprag, are set aside. The appellants are acquitted of the charges levelled against them under sections 304 B, 120 B, 498 A and 201 IPC. The appellant Mahendra Singh is in custody. He shall be set at liberty if not wanted in any other case. Appellant Smt. Sub Dei Devi alias Subudhi Devi is on bail. She need not surrender to her bail bonds, which are cancelled, and the sureties are discharged.

**27.** Let a copy of this judgment alongwith the record of the case be immediately sent back to the court concerned for needful compliance under intimation to this court within two months positively.

**(**J.C.S.Rawat J)

DECEMBDER 24th 2004